

Kentucky Family Matters

News & Information About Kentucky Family Court

Fall 2004



Judge FitzGerald receives Child Advocate of the Year Award

Jefferson Family Court Judge Patricia Walker FitzGerald has received the 2004 Child Advocate of the Year Award from the Louisville Bar Foundation. The award was presented Sept. 30 at the Best of St. James Preview Party, a charitable event benefiting the CASA Program of Jefferson County.

The Louisville Bar Association established the Child Advocate of the Year Award in 2002 to honor attorneys who have provided exemplary service in advocating for the rights of children. Past recipients include Chief Justice of Kentucky Joseph E. Lambert and veteran Family Court practitioner Richard C. Porter.

Jefferson Family Court judges unanimously voted to nominate Judge FitzGerald for her dedicated service to children on and off the bench.

"Her early involvement as an attorney was as a guardian *ad litem*," noted Chief Jefferson Family Court Judge

Stephen George. "She has been pivotal in Family Court achieving the national recognition we have received. She continues to be involved with children, but now it is on a national, as well as a local, level. She is working toward systemic changes to courts nationally to ensure that children are protected. We are honored to have her as a colleague and a member of our judiciary."

Judge FitzGerald earned a juris doctor from the University of Louisville Brandeis School of Law and has practiced law since 1978. She served as a guardian *ad litem* for 10 years and was a hearing officer for special education cases for the Board of Education. In 1995 she was appointed to the Circuit Court bench and is a former chief judge of Family Court.

Judge FitzGerald is on the board of directors of the National Council of Juvenile and Family Court Judges and



Jefferson Family Court Judge Patricia Walker FitzGerald, right, received the 2004 Child Advocate of the Year Award from the Louisville Bar Foundation.

is co-chair of the Subcommittee on the Interstate Compact on the Placement of Children. She also is lead judge on the Victim's Model Court for other states. Judge FitzGerald is married to environmental attorney Tom FitzGerald and they have three teenaged sons.

Warren named manager of Kentucky Family Court

Chief Justice Joseph E. Lambert has named prominent Kentucky attorney Penny Warren as general manager of the Department of Mediation and Family Court Services. The appointment was effective Sept. 1. Ms. Warren replaces attorney Carla Kreitman, who left the Administrative Office of the Courts to serve as court administrator for Jefferson Circuit Court.

Ms. Warren comes to the AOC from the Lexington office of Wyatt Tarrant & Combs where she was an attorney in the firm's Mineral & Energy and Commercial Litigation practice groups. She has argued and won two cases before the U.S. Supreme Court. She

also has extensive experience arguing before the Supreme Court of Kentucky and the U.S. Sixth Circuit Court of Appeals.

In recent years Ms. Warren concentrated her private practice in the areas of complex commercial litigation, mineral law and appellate practice. She gained experience in the public sector as Kentucky's



Attorney Penny Warren began as general manager for Family Court Sept. 1.

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From the Desk of the Family Court Manager

Penny Warren
Mediation and
Family Court Services

It has been a real pleasure working with the Department of Mediation and Family Court Services since I started this position in September. Everyone I have met is dedicated and enthusiastic about their work and the many opportunities to make a difference through Family Court and the mediation process.

Just before my arrival, the Department of Family Court was merged with the Alternative Dispute Resolution Services Department at the Administrative Office of the Courts. We considered many different names for the merged department and finally agreed upon Mediation and Family Court Services as best

descriptive of our joint mission. Because mediation is such a broad-based and rapidly expanding aspect of the law, we did not want to limit its scope by the modifier "family," as in a name such as "Family Court and Mediation." Thus, mediation stands alone at the beginning of the department name, followed by reference to the full range of Family Court services.

While mediation will grow in its independent way in the future, the synergistic effect of the merger has quickly become apparent through such successful projects as the recent permanency mediation pilot project in Harrison, Nicholas, Pendleton and Robertson counties. So far, 11 of the 12 permanency cases have been successfully resolved. We will be starting additional permanency pilot projects in several other locations in the near future and anticipate hiring a permanency mediation coordinator before the first of the year.

I look forward to getting to know each of you as we schedule visits to all of the Family Court sites. There are several exciting projects being developed and programs being expanded. You will be hearing more about them in future issues of *Family Matters*.

Thanks to all of our current newsletter contributors. We welcome your input on topics for the newsletter.

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Warren is new Family Court manager

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assistant attorney general from 1980 to 1985 and director of the attorney general's Appellate Division from 1985 to 1988.

"We are delighted to have an attorney of the stature of Penny Warren directing Kentucky Family Court," said Chief Justice Lambert. "Family Court is one of my highest priorities and Ms. Warren will bring outstanding leadership to this vital role of serving Kentucky children and families."

Ms. Warren holds a law degree from the University of Kentucky, a master's in business administration from the University of Arkansas and a bachelor's degree from Murray State University. She is a member of the Fayette County, Kentucky and American Bar associations.

Family Court currently serves 43 Kentucky counties and nearly 2 million citizens, half of Kentucky's population. Family Court is a division of Circuit Court, Kentucky's highest trial court level, and employs 34 full-time judges with the same qualifications as other Circuit Court judges. Family Court allows one judge to hear all matters involving a particular family, in a court designed specifically to meet the needs of family law.

Campbell Family Court moves to Circuit Courthouse

Campbell Family Court hosted an open house May 14 to showcase its new facility in the Campbell County Circuit Courthouse at 300 York St. in Newport.

Family Court Judge Michael Foellger and his staff are excited to have more space, which includes three mediation rooms, a children's waiting area and windows! Guests included friends, family and members of the local Bar Association.

Judge Foellger gave awards to recognize the mediators, guardians *ad litem*, Drug Court staff and his wife, Sandy, who provided the food. (She's an excellent cook!) Judge Foellger was recognized for his tremendous dedication to the families of Campbell County.

If you are in the Northern Kentucky area, please stop by as the Family Court staff would love to give you a tour.



Above: Guests toured the courtroom of Family Court Judge Michael Foellger during an open house for Campbell Family Court in Newport. Left: Visitors enjoyed refreshments in the main entrance.



Playroom for Jefferson Family Court receives 'Extreme Makeover'

Chief Family Court Judge Stephen George unveiled the renovated Family Court playroom at an open house Oct. 22. The project was funded by a \$2,000 grant from the Metro Louisville Office of Youth Development and spearheaded by the Home of the Innocents (HOI). The playroom is staffed by volunteers from the Exploited Children's Help Organization (ECHO).

"The work of ECHO and the Home of the Innocents on this project shows a dedication to all children in the community," said Judge George at the open house. "The playroom is a wonderful asset to Family Court and we're pleased to provide such a positive, friendly environment to children who have to be here."

HOI therapist and artist-in-residence Penny Wright directed the 10-month project. It included repainting walls, bookshelves and furniture; removing or refurbishing old toys; unpacking new toys and organizing the contents of the room. Except for the services Wright provided, the "kid power" was provided by about 50 children from the HOI.

After interviewing the children about their design recommendations, Wright decided the walls should be painted with colorful depictions of professions the children might pursue as adults. Wright's goal was to create a room that would make children feel welcome and at ease. The HOI supplemented the grant with additional funds and materials.



Penny Wright, a volunteer with the Home of the Innocents, produced original artwork for Jefferson Family Court's playroom.

"Our mission at the HOI is to improve the lives of children during difficult times," said Judith Bloor of the Home of the Innocents. "Our work on the playroom is just an extension of that mission."

ECHO volunteers have been staffing the playroom for five years, and there is still a critical need for additional help, said Lucy Lee. "The playroom is open Tuesday, Wednesday and Thursday from 9 a.m. to noon because that is when most children are at Family Court. If more people were willing to give a few hours of their time each month, we could serve a lot more children."

For more information about volunteering in the Family Court playroom, call ECHO at 502-636-3670. The Exploited Children's Help Organization is a non-profit organization dedicated to reducing the incidence and trauma of child exploitation.

The Home of the Innocents is one of the state's largest providers of services to vulnerable children. Each day the home offers support to more than 200 victims of abuse, abandonment and neglect. Its Kosair Charities Pediatric Convalescent Center serves 46 medically fragile, terminally ill and technology dependent children.

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Fox 41 TV covered remarks given at an open house Oct. 22 for Jefferson Family Court's newly renovated playroom.



ART as an alternative to detention

Karen Nitschke displays an example of the art produced through a program offered jointly by the Abraham Hall Emergency Youth Shelter, the Art Room and McCracken Family Court. Nitschke is the Family Court case specialist for McCracken County.

*By Tina McKnight
Project Director*

The Abraham Hall Emergency Youth Shelter in collaboration with the Art Room and McCracken Family Court is offering a program using art as an alternative to detention in McCracken County.

Each student is encouraged to envision, sketch, create and glaze three to six handmade clay projects. Students also produce a piece to be included in a composite class project. These creations are beginning to be displayed at the McCracken County Courthouse.

The program's goal is to help students achieve higher self-esteem through art projects they can call their

own, emphasize their worth and encourage greater accomplishments.

The program offers mentors to at-risk youth, which allows them to have a positive relationship with an adult who encourages them to follow their dreams, use their strengths and accept new challenges. Each mentor is required to complete a training program offered by the Abraham Emergency Youth Shelter.

McCracken Family Court Judge Cynthia Sanderson selects participants she believes would benefit from the art program. Generally, these are young people who are in court for a status offense such as truancy, running away, or being out of control at home or at school. Judge Sanderson and her staff have made the district judges and court designated workers aware of the program so they may also make referrals.

To date, this program has been offered on two weekends with the last one held in July 2004. I was able to serve as a mentor at this program. It was a great opportunity for the youth to develop an appreciation for art. We

offered positive reinforcement and discussed anger management, career opportunities and coping skills. These youth need positive role models in their lives and this program offers that opportunity. For more information, call Project Director Tina McKnight at 270-415-9070.



Family Court in the News

Is your Family Court making news? If you think your Family Court is newsworthy, contact Kelly Stephens at 800-928-2350 to request a news release. The AOC's Office of Public Information is responsible for preparing and distributing news releases for Family Court. If your news merits attention, Kelly will coordinate a news release with the AOC's public information officer who will distribute it to the appropriate media outlets.

McCracken Family Court hosts training for law office professionals

*By Nita Pursley
Administrator
McCracken Family Court*

McCracken Family Court hosted a free, two-hour training session for law office professionals Aug. 20. Thirty-four secretaries, paralegals and administrative assistants attended. McCracken Family Court Judge Cynthia Sanderson and her staff presented the program.

Heather Roberts, legal assistant, talked about local rule requirements, deadlines and processing paperwork. She handed out checklists and flow charts for the different areas of court. Karen Nitschke, case specialist, gave an overview of all the programs used in McCracken Family Court.

Judge Sanderson discussed domestic violence issues, stressing under what circumstances a petition for an emer-

gency protective order is and is not appropriate. Nita Pursley, Family Court administrator, gave an overview on who to call locally for different kinds of information.

Frances Wright, judicial secretary, gave a list of "old secretary tips." The program was well received with almost all of the attorneys who practice in our court sending their office personnel.



A View From the Bench

*Honorable Jo Ann Wise
Fayette Family Court
6th Division*



Since I became a Family Court judge in January 2003, the most common question I get is “How is it? Do you like it?” My response has always been “Yes, I love it!” Even now, after the “honeymoon” is probably over, not only do I like it, but I like it more and more with each day. What other job pays you to help as many people as I get to help and work on projects that have tremendous, positive impact on our community? I can think of no other job like this, and I would not trade my experiences for the world.

My week starts out with a real eye-opener in domestic violence court. I must be on my toes and ready to recognize domestic violence and enter appropriate orders of protection to

prevent future violence. On Monday afternoons, Tuesdays and Wednesdays, I attend meetings, conduct pre-trial and status conferences, and hold hearings in various Family Court cases. The goal is to efficiently and effectively progress cases to resolution.

Each Wednesday I end the day by meeting with my support worker, Melissa Doyle, to prepare for the status and dependency, neglect and abuse dockets. I assess the issue on the next day’s docket and how each case is progressing in terms of protection and permanency for the children.

The status and dependency, neglect and abuse dockets are on Thursday mornings, followed by the paternity docket. I take these courts very seri-

ously, and I’m usually ready for a mental break when I’m finished. If I have an adjudication hearing in a dependency, neglect and abuse case, it is held on Thursday afternoon. I also use Thursday afternoons to review the records for the Friday dockets.

On Fridays, I call my child support enforcement docket at 9:30 a.m. and my “family docket” (divorce, custody and other family cases formerly under the exclusive jurisdiction of the Circuit Court) at noon. On Thursday afternoons and Friday mornings, I go through each record on the noon docket, reviewing the motion to be heard, all responses and the case history. I like to be proactive in these cases and my review of each record allows me to analyze what has happened in the case, where the case is now, why the case is in its present status and what can be expected of the case in the future.

At the end of the week, I usually feel very good about what we’ve been able to do for people and look forward to beginning the next week. I often say I have the best job in the world!

Carla Kreitman leaves Family Court, but stays with Court of Justice



Carla Kreitman was Family Court manager before leaving the AOC to serve as court administrator for Jefferson Circuit Court.

It is with much sadness that we say good-bye to Carla Kreitman, manager of the Family Court Department, who left the Administrative Office of the Courts Aug. 31 to serve as court administrator for Jefferson Circuit Court.

Carla came to the Administrative Office of the Courts in 1998 after working with the Family Court pilot project in Louisville for five years. She became the first manager of the

Family Court Department and saw the number of Family Court sites grow from one to 43 statewide, expanding to serve nearly 2 million Kentuckians.

She also played a key role in the transition when

Family Court became a permanent part of the Kentucky Constitution after the Family Court Amendment passed in November 2002.

Carla is an experienced administrator and attorney who made unique contributions to the Kentucky Court of Justice. She played a key role in educating the public about Family Court through the many print and broadcast interviews she gave the last few years.

We wish her all the best in her new position and are pleased the state court system will continue to benefit from her commitment and expertise.



Recent Court Decisions in Family Law



By Michael Niemietz
Family Court Summer Intern

The Kentucky Supreme Court and Kentucky Court of Appeals recently addressed several issues relating to family law and domestic relations. Here is a brief analysis of those decisions:

Division of Marital Property

In *Sexton v. Sexton*, Ky., 125 S.W.3d 258 (2004), the Kentucky Supreme Court decided that the appellee's non-marital interest in an apartment building does not transform into marital property when the partnership interest acquired for the apartment building was placed in the parties' joint names. The appellee owned a 94 percent interest in an apartment building prior to his marriage to the appellant. In exchange for the apartment building, the parties acquired a 1/6th interest in a partnership in their joint names. The court reasoned that the name on the title does not control the property's character, and appellee's parents did not intend for appellant to receive any interest in the partnership as a result of placing the partnership interest in the parties' joint names.

Calculation of Earning Capacity

In *Polley v. Allen*, Ky. App., 132 S.W.3d 223 (2004), the Court of Appeals decided that the trial court improperly took judicial notice of occupational statistics concerning Polley's earning capacity. Kentucky Rule of Evidence (KRE) 201 allows a court to take judicial notice of adjudicative facts, but these facts must not be subject to reasonable dispute.

The trial court took judicial notice of the statistics Allen offered from the Web site of the United States Department of Labor, Bureau of Labor Statistics. Polley appealed this decision, claiming Allen failed to establish the source, accuracy and reliability of the statistics.

The Court of Appeals agreed with Polley, stating, "Because the source of the information was not specifically identified, we cannot determine if it

was capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The court questioned the weight to be given to the statistics that referenced national data to establish that Polley was underemployed for purposes of determining child support. National wage data should not be a controlling factor but may be instructive.

Husband's Maintenance Obligation

The Kentucky Supreme Court overruled *John v. John*, Ky. App., 893 S.W.2d 373 (1995), with its ruling in *Messer v. Messer*, Ky., 134 S.W.3d 570 (2004). KRS 403.250 states:

1. Except as otherwise provided in subsection (6) of KRS 403.180, the provisions of any decree respecting maintenance may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable.

2. Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

In *John*, the court reasoned that by executing a written agreement to pay maintenance, the obligor has *ipso facto*, "agreed in writing," that maintenance will not terminate upon the death of either party or the obligee's remarriage.

After *Messer*, the court concluded: Absent a specific statement in the written agreement or in the decree that maintenance will not terminate upon the death of either party or the obligee's remarriage, the occurrence of one of those statutory contingencies terminates the maintenance obligation by the operation of law. *Messer*, 134 S.W.3d 570, 573.

Clear and Convincing Evidence

The maternal grandparents filed a motion for child custody in *Vinson v. Sorrell*, Ky., 136 S.W.3d 465 (2004). The father intervened and filed his own motion for child custody. The key issue presented in this case was whether the natural father of the child, whose

custody was the subject of this litigation, waived his superior right to custody by clear and convincing evidence. The court stated: The waiver "requires proof of a knowing and voluntary surrender or relinquishment of a known right." Because this is a right with both constitutional and statutory underpinnings, proof of a waiver must be clear and convincing. As such, while no formal or written waiver is required, statements and supporting circumstances must be equivalent to an express waiver to meet the burden of proof. *Id.* at 469. Without a finding that the parent is unfit, or without clear and convincing evidence of a knowing and voluntary surrender of parental rights, a parent is entitled to custody.

Defining "Family Members"

In *Kirby v. Commonwealth*, Ky. App., 132 S.W.3d 233, the court determined that the ambiguous penal statute, which gave no direction on whether to use the civil or common law method of determining kinship, should be interpreted using the common law method.

Kirby shot and killed his first cousin, Johnson, while Johnson was intensely arguing with Kirby's mother. Using the civil definition of kinship, Kirby would not be able to avail himself of the domestic violence exception in KRS 439.3401(5) which states, "the enhanced penalties for violent offenders shall not apply to a person who has been determined by a court to have been a victim of domestic violence or abuse pursuant to KRS 533.060 with regard to the offenses involving death of the victim." KRS 533.060(1) states: "the person against whom the weapon was used had previously or was then engaged in an act or acts of domestic violence and abuse as defined in KRS 403.720 against either the person convicted or a family member as defined in KRS 403.720 of the person convicted." The statute is silent as to which definition to use, so the court resolved the doubt in favor of the accused. Under the common law method, a first cousin is a "family member," allowing Kirby to avoid the harsher sentencing.

New act provides clarity, conforms with federal law

By Michael Niemietz
Family Court Summer Intern

The Kentucky General Assembly passed House Bill 91 at the end of the 2004 session. HB 91 adopts the changes suggested by the American Bar Association to the Uniform Child Custody Jurisdiction Act (UCCJA). The new act, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), is an entirely new arrangement intended to bring the UCCJA into conformity with federal law, specifically the Parental Kidnapping Prevention Act (PKPA) and the Violence Against Women Act (VAWA). The new act clarifies sections that have been interpreted inconsistently throughout the country. This article examines the important distinctions between the old and new acts.

Clarifying Jurisdiction

Under the UCCJA, four methods were available to determine whether a court had initial jurisdiction. This left open the possibility that more than one state could have jurisdiction at a given time. Under the PKPA, however, full faith and credit cannot be given to a child custody determination by a state that exercises initial jurisdiction as a “significant connection state” when there is a “home state.” Under the UCCJEA, home state jurisdiction is given priority to conform with the PKPA, thus improving the chances that one state’s order will be entitled to interstate enforcement as a matter of federal law.

The state that entered the initial custody determination will have exclusive continuing jurisdiction. Previously, the UCCJA has been interpreted to allow concurrent modification jurisdiction in the child’s new home state, and in the state issuing the original decree based on significant connection jurisdiction. The new act expressly rejects the above interpretation: “Exclusive continuing jurisdiction continues in a court that has made a custody determination consistent

with the UCCJEA until: neither the child, the child and a parent, nor the child and a person acting as a parent have a significant connection with the state and substantial evidence concerning the child is no longer available in the state; or the child, parents, and any person acting as a parent no longer live in the state.” The state with continuing exclusive jurisdiction may relinquish its authority if it determines that another state has more significant connection to the child.

Emergency Jurisdiction

The UCCJEA also clarifies questions about emergency jurisdiction. The UCCJEA provides that courts can have *temporary* emergency jurisdiction “when a child who is in the state and has been abandoned, or an emergency makes it necessary to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.” This is true even if there is a proceeding commenced properly in another state. If another state has jurisdiction, the judge in the new forum must immediately contact the judge in the other proceeding. The new order for emergency jurisdiction is temporary so that further resolution of the custody issue can be resolved in a state that has a better basis for taking jurisdiction.

Custody Proceedings Defined

The UCCJEA lists the proceedings covered by the act, which is a significant change from the UCCJA. The new definition of “custody proceedings” includes: a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights and protection from domestic violence, in which the issue may appear.” Virtually all cases involving custody or visitation with a child are covered with the exception of adoption.

Enforcement Provisions

Neither the UCCJA nor PKPA provided enforcement procedures or

remedies that would apply uniformly to all states. All of the enforcement procedures differed from jurisdiction to jurisdiction and the UCCJEA remedies this issue. Here are two examples:

Registering a Custody Determination

A simple procedure now exists for registering a custody determination in another state, which will allow a party to know in advance whether that state will recognize the party’s custody determination. A request for registration is sent to the court with copies of the custody order and other required information. The court then files the order as a foreign judgment and serves notice on any parent or person acting as a parent who has been awarded custody or visitation. Those persons have 20 days from service to request a hearing to contest the registration. If the request is not made, the order is confirmed as a matter of law.

Expedited Enforcement of Custody

The UCCJEA also provides expedited enforcement of custody determinations to ensure enforcement when there is a risk of danger or abduction of the child. The new procedures provide for an enforcement hearing one judicial day after service, which will result in an order authorizing the petitioner to take immediate physical custody of the child, unless one of the few statutory defenses is met.

Because some parents may be justifiably concerned about giving notice of an enforcement proceeding to a parent whose likely reaction would be to run away or hurt the child, the UCCJEA allows the court to issue a warrant to take physical custody of the child. The court can do this if there is a finding that the “child is imminently likely to suffer serious physical harm or be removed from the state.” The act also allows law enforcement officers, at the behest of a judge, prosecutor or other public official to take any lawful action necessary to locate a child or a parent and assist in enforcing a child custody determination.

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